LOKMAN NOOR ADAM v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
CHE MOHD RUZIMA GHAZALI JCA
NORDIN HASSAN JCA
[CRIMINAL APPEAL NOS: W-05-241-07-2021
& W-05(H)-246-07-2021]
31 OCTOBER 2022

Abstract – *Threatening a would-be witness in the court of law should not be taken lightly. Whether the witness is actually deterred or influenced by the statement made by the contemnor is of no consequence; it suffices that the statement is inherently likely to interfere with the administration of justice.*

CRIMINAL PROCEDURE: *Contempt of court – Appeal – Appeal against conviction and sentence – Accused lodged police report against witness in 1MDB trial and held press conference to give overview of police report – Accused found to be in contempt and convicted for offence and sentenced to one-month imprisonment – Whether police report absolute privilege document – Whether contempt of court proceeding could be initiated against accused based on police report – Whether prosecution particularised specific words that allegedly intimidated witness – Whether witness deterred or influenced by accused's statement – Whether mens rea proven – Whether conviction and sentence safe – Rules of Court 2012, O. 52*

The appellant had lodged a police report against one Datuk Amhari Effendi Nazaruddin ('DAEN'), in respect of the latter's evidence given in the ongoing 1MDB trial, and later, on the same day, held a press conference, giving an overview of the said police report. An officer from the Malaysian Anti-Corruption Commission lodged a police report, alleging that the purpose of the appellant's police report was to harass and intimidate DAEN and any potential witness who may step forward to give evidence in the 1MDB trial. The backdrop set out above prompted the respondent to file an application at the High Court, pursuant to O. 52 of the Rules of Court 2012 ('ROC'), to cite the appellant for contempt of court. At the conclusion of the proceedings, the High Court Judge ('HCJ') found the appellant guilty of contempt of court and sentenced him to one-month imprisonment. Hence, the present appeals by (i) the respondent against the sentence; and (ii) the appellant against the conviction and the sentence, on the grounds that: (a) no contempt of court proceeding could be initiated against the appellant based on the said police report as it was an absolute privilege document; (b) the appellant was prejudiced by the uncertainties of the charge that he had to purge as the respondent failed to particularise the specific words that

intimidated DAEN in the statement filed pursuant to O. 52 r. 3(2) of the ROC; (c) the police report, and the immediate subsequent video interview, would not amount to intimidation of DAEN as he had already given his testimony in court. The purpose of the appellant lodging the police report was for the police to investigate the revelations made by DAEN himself in the court of the 1MDB trial. Contrary to intimidation, the appellant's action was, in fact, to ensure that the testimony given by witnesses, including DAEN, in the 1MDB trial was truthful; and (d) it had not been demonstrated, and no evidence was produced by the respondent, on how the police report and the subsequent words uttered by the appellant would influence the evidence which had been given by DAEN or, in any way, intimidate him. The respondent failed to prove beyond reasonable doubt that the actions taken by the appellant was an intimidation of witnesses made with the intention to impede the administration of justice.

Held (dismissing appeals)

Per Che Mohd Ruzima Ghazali JCA delivering the judgment of the court:

(1) The appellant's police report could be classified as a first information report under s. 107 of the Criminal Procedure Code. However, the principle of absolute privilege would not be extended unnecessarily, in particular on statements made with no genuine intention to discharge the public-shared duty in assisting a criminal investigation. The words used in the appellant's police report could determine his intention. The words 'manusia-manusia durjana' and 'mereka yang memperolehi manfaat dari perlakuan jenayah ini bebas dan tidak didakwa pula' should not be there if the appellant sincerely desired to facilitate the effective discharge of the shared public duty in assisting a criminal investigation by the relevant authorities. Therefore, the principle of absolute privilege should not be extended to the statements made by the appellant in his police report. (paras 22, 24, 26 & 27)

(2) In the respondent's amended statement, filed pursuant to O. 52 r. 3(2) of the ROC, the respondent had listed down several acts of contempt of court allegedly committed during the press statement to the media. The respondent also clearly stated that the objective or purpose of the appellant lodging the police report was to harass and intimidate DAEN, other witnesses and any potential witnesses who may come forward to give evidence in the 1MDB trial. To support the statement, the respondent exhibited a copy of the press statement transcript and a copy of the police report. The amended statement, together with the exhibits tendered, formed sufficient notice to the appellant to purge the charge of contempt of court. (para 38)

(3) One witness had yet to give his evidence in the ongoing 1MDB trial. Whether the witness was actually deterred or influenced by the appellant's statement was of no consequence. It was sufficient if the

action complained of was inherently likely to interfere with the administration of justice. The appellant's act of threatening a would-be witness, through his press statement, was an act of flouting the administration of justice itself and not the court or the witness. Once it is established that the act flouted the administration of justice, it is contempt of court regardless of whether the witness is affected by the statement or not. (paras 34 & 36)

(4) There are exceptions in which a person may be guilty of an offence although he has no guilty mind; contempt of court is one of those. There was no doubt that the appellant had intentionally lodged the police report, including the choice of words used in the said report. Similarly, the act of explaining his police report and further uttering intimidating comments against DAEN and future witnesses in the ongoing 1MDB trial *via* the press statement, were also done intentionally. Therefore, there was nothing wrong when the HCJ made a finding that 'In so doing, his *mens rea* was made manifest' in His Lordship's judgment. (paras 40 & 42)

(5) The HCJ, in fixing the punishment for the offence of contempt of court committed by the appellant, had taken into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the appellant in committing the offence and other aggravating factors involved. The sentence was within the ambit of the HCJ's discretion and passed in accordance with established judicial principles. Therefore, there was no good reason to disturb the sentence passed by the HCJ. (para 47)

Case(s) referred to:

Achieva Technology Sdn Bhd v. Lam Yen Ling & Ors [2009] 1 LNS 432 HC ***(refd)***
Ang Chai Seng v. PP [2000] 1 CLJ 213 CA ***(refd)***
Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors [1986] 2 CLJ 109; [1986] CLJ (Rep) 58 SC ***(refd)***
Attorney General v. Butterworth And Others [1962] 3 All ER 326 ***(refd)***
Attorney General v. Leveller Magazine Ltd And Others [1979] 1 All ER 745 ***(refd)***
Attorney-General v. Manjeet Singh Dhillon [1991] 1 CLJ 216; [1991] 1 CLJ (Rep) 22 SC ***(refd)***
Au Wai Pang v. Attorney-General [2016] 1 SLR 992 ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Chandra Sri Ram v. Murray Hiebert [1997] 3 CLJ Supp 518 HC ***(refd)***
Dhooharika v. Director Of Public Prosecutions (Commonwealth Lawyers' Association Intervening) [2015] AC 875 ***(refd)***
Giani Ram v. Ramnath Dutt AIR 1955 Rajashtan 123 ***(refd)***
Husdi v. PP [1979] 1 LNS 33 HC ***(refd)***
Koperasi Serbaguna Taiping Barat Bhd v. Lim Joo Thong [1998] 1 LNS 366 HC ***(refd)***
Lee Yoke Yam v. Chin Keat Seng [2012] 9 CLJ 833 FC ***(refd)***
Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 FC ***(refd)***

Murray Hiebert v. Chandra Sri Ram [1999] 4 CLJ 65 CA ***(refd)***
Noor Azman Azemi v. Zahida Mohamed Rafik [2019] 3 CLJ 295 FC ***(refd)***
Nor Aziz Mat Isa v. Sun Teoh Tia (SAC) & Ors [2021] 3 CLJ 186 FC ***(foll)***
PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener) [2019] 6 CLJ 1 FC ***(refd)***
R v. Kellett [1975] 3 All ER 468 ***(refd)***
R v. Smithers And Bowen (1983) 5 Cr App R (S) 248 ***(refd)***
Re Bramblevale Ltd [1970] Ch 128 ***(refd)***
Re Zainur Zakaria [1999] 3 CLJ 696 HC ***(refd)***
Wee Choo Keong; Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor & Other Appeals [1995] 4 CLJ 427 SC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 13
Criminal Procedure Code, s. 107
Federal Constitution, arts. 10(1)(a), (2)(a), 126
Rules of Court 2012, O. 52 r. 3(2)

(Criminal Appeal No: W-05-241-07-2021)
For the appellant - Muhammad Shafee Abdullah, Genevieve Vanniasingham & Wan Aizuddin Wan Mohammed; M/s Shafee & Co
For the respondent - Dusuki Mokhtar & Norzilati Izhani Zainol; AG's Chambers

(Criminal Appeal No: W-05(H)-246-07-2021]
For the appellant - Dusuki Mokhtar & Norzilati Izhani Zainol; AG's Chambers
For the respondent - Muhammad Shafee Abdullah, Genevieve Vanniasingham & Wan Aizuddin Wan Mohammed; M/s Shafee & Co

[Editor's note: For the High Court judgment, please see Attorney General v. Lokman Noor Adam [2021] 10 CLJ 282 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Che Mohd Ruzima Ghazali JCA:

Introduction

[1] Attorney General (respondent) instituted a contempt of court proceedings against Lokman Noor bin Adam (appellant) in respect of statements made by the appellant in a police report and to the media on 25 September 2019 pertaining to matters related to the ongoing criminal trial No. WA-45-7-11-2018 and WA-45-8-11-2018 (1MDB trial). At the end of the proceedings, the learned High Court Judge (LHCJ) found the appellant guilty of contempt of court and accordingly convicted him. The appellant was then sentenced to one month imprisonment.

[2] Dissatisfied with the said decision, the appellant appeals against the conviction and the sentence (Appeal No. W-05-241-07-2021). On the other hand, dissatisfied with the sentence pronounced by the LHCJ against the appellant, the respondent appeals (Appeal No. W-05(H)-246-07-2021).

Brief Background Facts

[3] On 25 September 2019 at 3.24pm, the appellant lodged a police report against Datuk Amhari Effendi bin Nazaruddin (DAEN) in respect of the evidence given by DAEN at the ongoing 1MDB trial.

[4] On the same day at 6.33pm, the appellant together with one Dato' Sri Ali Mohamad (DSAM) held a live press conference to give an overview of the police report that he lodged against DAEN. The said live press conference was video recorded.

[5] Two days later, on 27 September 2019 at 10.30am, Abd. Hamid bin Ibrahim (AHBI), an officer from the Malaysian Anti-Corruption Commission had lodged a police report alleging that the purpose of the appellant's police report was to harass and intimidate DAEN and, any potential witnesses who may come forward to give evidence against the accused in the ongoing 1MDB trial.

[6] Based on the said background, the respondent filed an application under O. 52 of the Rules of Court 2012 (ROC) for leave to cite the appellant for contempt of court. Leave was granted on 22 October 2019. Appeal filed by the appellant against the leave granted was dismissed by the Court of Appeal on 20 July 2020 and by the Federal Court on 14 February 2021. The appellant had to purge his contempt before the High Court.

LHCJ's Finding

[7] The respondent's complaint that the words uttered by the appellant sought to influence the outcome of the trial is not sustainable since the statement filed under O. 52 r. 3(2) of the ROC does not make reference to comments made by the appellant which intended to influence the result of a pending trial. As the statement is akin to a charge in a criminal case, there can be no room for guesswork in matters of that nature. Therefore, the expanded ground raised by the respondent cannot be entertained.

[8] As to the words uttered by the appellant constituted a threat against the witness who had given evidence in the 1MDB trial as well as future witnesses who come forward to testify at that trial, the act of the appellant in making the statements against the witness in the media and in the police report clearly gave rise to a real risk of interference with the administration of justice by constituting a threat both expressly and implicitly against the witness for having given evidence and constituted the *actus reus* of contempt of court and in so doing his *mens rea* was made manifest. The acts on the part of the appellant will also have similar effects on prospective or future witnesses in the ongoing trial. This also amounts to a real risk of interference with justice and, therefore, constitutes the *actus reus* of contempt of court. It is also a matter of strong inference that the appellant acted with the specific

intention of deterring potential witnesses from giving testimony and in so doing to interfere with the administration of justice which constituted the *mens rea* of the offence.

[9] Interference with the administration of justice is of a serious nature. The effect of the statements made by the appellant gave rise to a real risk of impeding or deterring future witnesses from giving evidence in a like manner. This interference with the due administration of justice cannot be taken lightly. Courts must sanction such action with the punishment it deserves to reflect its abhorrence of such conduct and to act as a deterrent to would be offenders. The appellant also displayed no remorse and was unrepentant, which was an aggravating factor. Considering all the circumstances, the LHCJ imposed a sentence of imprisonment of one month.

The Appeal

[10] The appellant had listed 15 reasons in his petition of appeal. Only one reason related to the sentence imposed by the LHCJ. Before us, the crux of the argument by learned counsel for the appellant was that the LHCJ failed to differentiate between the acts of lodging the police report and making a press statement to media. There is nothing wrong with the act of lodging a police report unless the report is false. The police report cannot draw any contempt as decided by the Federal Court in the case of *Noor Azman Azemi v. Zahida Mohamed Rafik* [2019] 3 CLJ 295 (*Zahida*'s case) and the High Court decision in *Husdi v. PP* [1979] 1 LNS 33 (*Husdi*'s case). The LHCJ did not draw the distinction between consideration and muddle up between the two acts. Thus, His Lordship made a serious error in his finding of guilt against the appellant.

[11] Besides that, learned counsel for the appellant also argued that the respondent failed to particularise the specific words that intimidated DAEN in the statement filed under O. 52 r. 3(2) of the ROC. Therefore, the appellant was prejudiced by the uncertainties of the charge that he had to purge.

[12] Learned counsel for the appellant further submitted that the police report lodged against DAEN and the immediate subsequent video interview would not amount to intimidation of DAEN as he had already given his testimony in court. The purpose of the appellant lodging the police report was for the police to investigate the revelations made by DAEN himself under oath in the course of the 1MDB trial. The testimony of DAEN, which made the subject matter of the police report lodged by the appellant is not challenged by the respondent. Contrary to intimidation, the appellant's action was in fact to ensure that the testimony given by witnesses including DAEN in the 1MDB trial is truthful.

[13] It was also argued that DAEN's evidence as reflected in the police report does not bear any connection with the charges in the 1MDB trial but rather matters personal to DAEN which the appellant felt needed to be investigated by the authorities. It has not been demonstrated and no evidence was produced by the respondent of how such police report and subsequent uttered words by the appellant would influence the evidence which has been given by DAEN or in any way intimidate him. Thus, in a situation where evidence is not presented to prove the allegation beyond reasonable doubt, the act or the intent cannot be imputed against the appellant to establish liability. The respondent had failed to prove beyond reasonable doubt that the actions taken by the appellant was an intimidation of witnesses made with intention to impede the administration of justice.

Our Decision

[14] Our Federal Constitution has guaranteed freedom of speech and expression to every citizen as a fundamental right under art. 10(1)(a) but subject to the provision of cl. 2(a) which provides that:

> (2) Parliament may by law impose:
>
> (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

However, there is no codified law passed by our Legislature on contempt. Be that as it may, art. 126 of the Federal Constitution provides as follows:

> **126 Power to punish for contempt**
>
> The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

Similar provision is also stipulated under s. 13 of the Courts of Judicature Act 1964. Thus, any speech and expression of opinion would be not immune from the liability for exceeding the limits and it can be dealt with under the law of contempt of court.

[15] As to the law and procedure of contempt of court, the Supreme Court in the case of *Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors* [1986] 2 CLJ 109; [1986] CLJ (Rep) 58; [1986] 2 MLJ 193, had this to say:

> In this country, the need to protect the dignity and integrity of the Supreme Court and the High Courts is recognised by Article 126 of the Federal Constitution, and similar provision is repeated in section 13 of the Courts of Judicature Act 1964. Thus, unlike in England where there is no written Constitution, the jurisdiction of this Court to deal with contempt

of itself is conferred by the supreme law of Malaysia. Until different rules are made under section 16 of the Courts of Judicature Act, the procedure for contempt proceedings in the Supreme Court is governed by Order 52 of the Rules of the High Court 1980 read with rule 4 of the Rules of the Supreme Court. In addition, the Court can adopt summary contempt procedure on its own motion in cases where it is urgent and imperative to act immediately against contumelious conduct committed during its proceedings. When the contempt is not committed in the face of the Court, as is the case alleged here, it is equally important that the dignity and integrity of the Court be protected and preserved, and in such cases the contempt proceedings may be initiated by motion either by the Attorney-General or any private party who has sufficient interest in the matter, or even by the Court itself, although in practice it seems unjust to expect the Court to protect itself by being both complainant and judge, save in the unlikely event of the Attorney-General or the appropriate private party declining to act. In this case, the complainants are the successful parties in the two civil appeals, from which the present contempt proceeding arose. Surely, the complainants and their advocates and solicitors have sufficient interest in this matter to give them *locus standi.* (See also *MBF Holdings Bhd v. Emtex Corporation Bhd* [1986] 1 MLJ 477 and *Tan Sri Haji Othman Saat v. Mohamad bin Ismail* [1982] 2 MLJ 177).

[16] In the absence of a specific legislation on the contempt of court, the law on contempt of court in our country is guided by the common law principles. See Federal Court decision in *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401; [2002] 4 MLJ 241.

[17] As to the standard of proof, the burden of proof in a contempt proceeding is as in a criminal trial because contempt of court is an offence of criminal character since a contemnor may be sent to prison. See *Re Bramblevale Ltd* [1970] Ch. 128 which has been referred to by the Supreme Court in *Wee Choo Keong; Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor & Other Appeals* [1995] 4 CLJ 427; [1995] 3 MLJ 549 and by the High Court in *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp 518; [1997] 3 MLJ 240.

[18] Back to the appeal before us, the acts of contempt of court complained against the appellant emanate from statements made in a police report lodged by the appellant on 25 September 2019 (marked as exh. A2) and later on the same day made a press statement to the media which was recorded on a video (the transcript of the video marked as exh. A1). The contents of the police report exh. A2 lodged by the respondent is reproduced as follows:

Berdasarkan keterangan Datuk Amhari Efendi Nazaruddin di Mahkamah Jalan Duta, sepanjang September lalu dalam kes 1MDB yang melibatkan Dato' Sri Najib terdapat pengakuan secara jelas yang dibuat oleh Datuk Amhari bahawa beliau secara terang telah terlibat dalam penyalahgunaan kuasa dan rasuah. Ketika bersekongkol dengan Low Taek Jho (Jho Low) dalam melakukan penipuan dan penyelewengan sehingga mengakibatkan

Dato' Sri Najib teraniaya kerana perbuatan mereka. Saya membuat laporan ini untuk meminta pihak PDRM dan SPRM untuk menyiasat beliau kerana didakwa terlibat dalam penyalahgunaan kuasa dan rasuah dalam tiga perkara berikut:

1. Datuk Amhari mengakui beliau memiliki dan menerima gaji sebanyak RM25,000.00 sebulan dari syarikat swasta bernama ORBS Solutions Sdn Bhd semasa beliau masih bekerja sebagai penjawat awam.

2. Datuk Amhari mengakui di dalam Mahkamah bahawa beliau menerima dana sebanyak USD200,000.00 (RM840.000) dari Jho Low untuk membeli rumah pada tahun 2010, semasa beliau bekerja sebagai penjawat awam.

3. Datuk Amhari juga mengakui di hadapan yang Arif Hakim bahawa beliau telah menerima dana sebanyak USD880,000.00 (RM3.7 juta) dari Jho Low di dalam akaun bank asing BSI Switzerland semasa beliau bekerja sebagai penjawat awam.

Fakta-fakta yang dikeluarkan oleh Datuk Amhari sendiri di Mahkamah jelas menunjukkan bahawa beliau telah melanggar Akta SPRM serta Akta AMLA dan terlibat di dalam penyalahgunaan kuasa dan pengubahan wang haram. Adalah tiada masuk akal Dato' Seri Najib orang yang teraniaya akibat namanya digunakan oleh manusia-manusia durjana didakwa dan tercemar imejnya sedangkan mereka yang memperolehi manfaat dari perlakuan jenayah ini bebas dan tidak didakwa pula. Sekian laporan saya.

In the beginning of the transcript exh. A1, DSAM read back word to word what was stated by the appellant in his police report exh. A2. Then, the appellant delivered his statement to media. For better understanding, we produced in full the appellant's press statement to media as follows:

Pertama sekali kita nak buat ulasan sedikit ehh. Kalau kita lihat dari segi ... dari segi apa yang berlaku sepanjang tempoh perbicaraan dalam kes yang melibatkan SRC International baik, begitu juga dengan kes 1MDB pun baik. OK ..., semua kenyataan yang dikeluarkan oleh saksi-saksi lebih menjurus kepada aaa ... Jho Low mengatakan itu, Jho Low mengarahkan itu, Jho Low mengarahkan ini, dan daripada kenyataan yang keluar daripada Joaana juga Joaana mengesahkan bahawa memang beliau ada menerima arahan daripada Jho Low untuk menutup segala salah laku Jho Low ehh yang mana mereka ini melalui satu perbincangan di dalam BBM iaitu BlackBerry Messenger yang telah dirampas BlackBerry Joaana ni oleh pihak Taskforce Bank Negara, tetapi pihak SPRM menyembunyikan fakta ini ehh. Maknanya SPRM tidak memberitahu kepada umum tentang dapatan, nasib baik Dato Sri Najib ni ada lawyer yang hebat. Jadi apa yang berlaku lawyer ini berjaya mencungkil perbualan daripada di antara Joaana dan juga Jho Low dan dalam perbualan itu sendiri jelas menunjukkan bahawa Jho Low mengarahkan Joaana supaya merahsiakan semua transaksi di dalam aaaa ... urusan SRC International ini supaya hanya diketui oleh Jho Low oleh Nik Faisal, Joaana dan bukan Dato Sri Najib.

Begitu juga dengan saksi-saksi lain seperti Amhari dan sebagainya ehh ... dan hari ni kita tengok Shahrul pulak ehh bagi kenyataan semua jelas menunjukkan bahawa Dato Sri Najib tidak terlibat dengan kes SRC International dan dia juga tidak terlibat dengan kes 1MDB hanya namanya digunakan jadi itu sebabnya hari ni kira rasa dah tiba masanya pengkhianat-pengkhianat yang mengkhianati Dato Sri Najib ini kita buat laporan polis terhadap diri mereka kerana yang dapat ehh 200,000.00 US Dolar daripada Jho Low bukan Dato Sri Najib tetapi Amhari ...yang dapat nikmat ehh ... berapa juta tadi? 3.7 juta ... masuk dalam akaun BSI di Switzerland ehh bukan Dato Sri Najib, tetapi Amhari! Tetapi disebabkan Kerajaan Pakatan Harapan ni! Nk memusnahkan nama baik Dato Sri Najib! Walaupun kita yakin ... kalau mahkamah itu adil kes SRC akan dicampak kelongkang!!! Dato Sri Najib akan menang ... kes 1MDB juga akan dicampak kelongkang!!! Dato Sri Najib akan menang ... tetapi kita tengok tuan-tuan ... niat jahat Tun Mahathir menggunakan saksi-saksi yang merupakan orang yang pernah menjadi pegawai Dato Sri Najib tetapi saksi-saksi ini ALLAH Taala tunjukkan ... di dalam mahkamah mereka terbongkar bukan orang yang dipercayai sahaja, ... oleh Dato Sri Najib menang Dato Sri Najib percaya kat mereka ni ... rupanya mereka nilah pengkhianat yang mengkhianat dan bersekongkol dengan ... dengan Low Teck Jho ataupun Jho Low untuk menyeleweng, untuk menyalahgunakan kuasa, untuk melakukan pemindahan aa wang dan sebagainya menggunakan akaun yang dimiliki ... dan Nik Faisal sebagai pemegang amanah kepada akaun tersebut. Jadi hari ini ... saya menyeru kepada Jabatan Peguam Negara yang dipimpin oleh bekas ketua komunis Malaya punya peguam iaitu Thomy Thomas !! Thomy Thommas ini sudah pun diisytiharkan oleh mahkamah koroner ehhhh olehhhh aaaa hakim koroner yang menjadi hakim dalam pro ..., proses inkues arwah Adib. Dia telah diisytiharkan sebagai menghina mahkamah !!! kerana membuat keputusan membuat satu afidivit ... membuat satu afidivit sebelum inkues selesai bersidang!! Dia sudah membuat afidivit mengatakan bahawa Adib mati bukan akibat dipukul ... Kita tengok betapa mahkamah sendiri pun dah membuat keputusan ke atas apa yang dilakukan oleh Thomy Thommas. Cuma hari ini kita bukan hanya mahu Thommy Thommas dipecat!! Kerana Thommy Thommas adalah salah seorang yang bersekongkol dengan Tun Dr Mahathir untuk mengubah laporan perubatan aaaa ke atas Adib daripada mati akibat dipukul ehhh ditukar kepada mati kerana kemalangan. Akibat daripada berlakunya aaa pelanggaran dengan kenderaan. Jadi kalaulah Adib yang tiada salah dengan diaorang pun boleh aniaya itu sebab saya yakin kawan-kawan yang ada pada hari ini pun kita yakin bahawa hari ini Thommy Thommas sedang menganiaya Dato Sri Najib Tun Razak. Jadi kita tuntut supaya kes Dato Sri Najib ni hentikan perbicaraan ehhh hakim pun dah boleh menilai bahawa kes ini ehhh kes sampah!! ehh kes sampah!! dan kita lihat perbicaraan telah membuktikan bahawa Dato Sri Najib dianiaya si pelaku sebenar ialah Jho Low si pelaku sebenar yang salah seleweng dan salah guna kuasa ialah Nik Faisal dan juga Amhari ... begitu juga dengan Shahrul ehh. Selama hari ni kita tak pernah balun Shahrul ni tapi hari ni saya nak beritahu antara sebab kenapa 1MDB banyak membuat keputusan

keputusan bodoh ehhh contohnya di Pulau Pinang mereka membeli 10,000 ahh membeli tanah untuk membina 10,000 unit rumah mampu milik ... tujuan tuh memang cantik untuk erghh rumah mampu milik tetapi kena ingat dia beli tanah dengan harga yang besar dan "model" ape niii perniagaan modal perniagaan 1MDB kita cuma bagi modal 1 juta macam mana nak bina 10,000 unit rumah mampu milik sudah pasti dia kena dapatkan modal daripada pasaran modal sudah pasti dia kena terbitkan 5 billion bon yang menyebabkan Sultan Terengganu tidak bersetuju menyebabkan kerajaan Terengganu tak setuju dan akhirnya Terengganu Investment Authority terpaksa kita tukar menjadi ... menjadi 1MDB dan bila 1MDB modalnya datang daripada pinjaman modalnya datang dari penerbitan bon uhukkk uhukkk ... (Batuk) bagaimana mungkin manusia yang menjadi CEO seperti Shahrul ini boleh beli tanah yang dia tahu kalau nak bina 10,000 unit rumah mampu milik itu pun mestilah mendapat kebenaran daripada kerajaan negeri Pulau Pinang! bagaimana mungkin kerajaan negeri Pulau Pinang yang kita tahu diperintah oleh DAP ketika itu, mahu meluluskan aaa pembinaan 10,000 unit rumah mampu milik, kalau ada 10,000 satu rumah ada 3 orang pengundi dah ada 30,000 pengundi ... kalau 30,000 pengundi ni ehh dapat rumah mampu milik diberikan oieh kerajaan Barisan Nasional tak kan mereka tak appreciate kita...ehh...tak kan mereka akan mengundi DAP dalam pilihan raya itu kawasan pilihanraya Jelutong itu, itu kawasan Karpal Singh dulu ... Jadi! kenapa dah tahu tak boleh lulus pembinaan bangunan itu ataupun rumah mampu milik itu ... Shahrul boleh beli tanah ini ... jadi ini juga perlu disiasat oleh pihak polis ...! Saya tengah tunggu, saya tengah rakam apa yang Shahrul katakan dalam mahkamah, ... ehhh! Saya akan kumpulkan dan kita akan buat laporan ke atas Shahrul juga selepas ni ... yaaa yaaa (suara orang awam). Kita tak kan bagi peluang pengkhianat-pengkhianat yang takut dipenjarakan oleh SPRM ... menjadi BARUA kepada SPRM!!!! ehhh! ..., jangan reka cerita yang bukan-bukan ... untuk menjatuhkan imej dan kredabiliti Dato Sri Najib Tun Razak ... Jadi ini 3 perkara yang jelas ..., Saya CABAR, saya cabar ... ketua Polis Negara! Saya Cabar SPRM!! Latheefa Koya ... tolong ambil tindakan! Orang ni dah mengaku dalam mahkamah dia terima gaji, dia penjawat awam terima gaji 25,000 sebulan daripada OP Solution. Dia sebagai penjawat awam, dia juga telah menerima duit 200 ribu juta US Dolar bersamaan 880,000 Ringgit daripada Low Teck Jho dan dia juga terima duit ... yang dimasukkan ke dalam akuannya di luar Negara! Ehhh! Saya pun Jusa B! penjawat awam juga ...eehhh! Saya tak ada akaun di luar Negara sepertimana Amhari ni ehh! Ada akaun luar Negara dan menerima 3.7 juta ringgit!!! Ini di akui oleh Amhari sendiri ... ketika beliau di dalam sesi perbicaraan! ya ... (suara orang awam). Jadi, saya mintak supaya Peguam Negara membuang kes Bodoh ni!! Ehh! We have enough! U cakap Dato Sri Najib curi duit 1MDB ... ini sekarang dah 16 bulan kamu memerintah!, kamu masih gagal untuk membawa Dato Sri Najib ke muka pengadilan! Untuk mendakwa beliau! Sebagai telah mencuri duit 1MDB di bawah seksyen 372 kanun keseksaan. Kenapa tak buat!!!? Aaa ... Mahathir kata Najib penyamun ... siapa penyamun sebenar!? Mahathir!!! ... (suara orang awam) ...

Mahathir lah penyamun sebenar! Ehh! ... kalau nak dakwa Dato Sri Najib penyamun ... boleh dakwa Dato Sri Najib ann ... di bawah seksyen 392 ehh! Kanun keseksaan ... jadi tu sebabnya saya mintak supaya kes ini ehh, gugurkanlah segera ... jangan bazir duit rakyat terlalu banyak ehh! Ehh! ... ya betul! (suara orang awam). Bila ditanya oleh wartawan oleh ... oolehh mahkamah pihak-pihak peguam bela Dato Sri Najib macam mana kamu mengatakan Dato Sri Najib baik dengan Jho Low? Kita menerima jawapan Bodoh!!!!!! Yang saya rasa amat membazir masa ... ahh ... apa yang berlaku di mahkamah hari ni ... iaitu saya tau kerana erghhh Jho Low suka milo ais ... ehh ... hahaha (suara orang awam). Apa kejadahnya ni ehh! Saya nak cakap banyak suara tak berapa nak ada ... jadi saya menyeru kepada sahabat-sahabat ehh. Kita pastikan dalam masa terdekat ini ..., kita akan buat satu perhimpunan besar-besaran, kita akan menuntut bukan hanya! Thommy Thommas letakkan jawatan ... yes (suara orang awam) Kerana telah menghina mahkamah, kita mahu Mahathir juga meletakkan jawatan!!!! Setuju!!? Yaaa! setujuuuul! (suara orang awam). Sekian Assalamualaikum Warahmatullahi taala wabarakatuh.

[19] The main complaint raised by learned counsel for the appellant is that the LHCJ failed to differentiate between the acts of lodging the police report and making a statement in the press conference to the media. It was argued that His Lordship muddled up between the two acts and therefore, made a serious error in his finding of guilt against the appellant since the police report cannot be used to draw any act of contempt of court for the reason that the contents of the police report are protected under absolute privilege as decided by the Federal Court in *Zahida*'s case and by the High Court in *Husdi*'s case.

[20] First and foremost, we have to look at the events that had happened involving the appellant related to the statements made to the police as in the exh. A2 and the statements uttered by the appellant during the press conference to the media as in the transcript exh. A1. According to the chronology, just about two days after DAEN finished testifying in the 1MDB trial, the appellant lodged the police report exh. A2 on 25 September 2019 at 3.24pm. On the same day at 6.33pm, the appellant released a press statement to give an overview of the police report exh. A2 that he lodged against DAEN.

[21] Then, we have to consider the contents of both statements by the appellant in the police report exh. A2 and in the transcript of the press statement exh. A1 to determine whether there is any cause or reason to cite the appellant for contempt of court.

[22] Upon perusing the police report exh. A2, we have no quarrel that the said report can be classified as a first information report under s. 107 of the Criminal Procedure Code (CPC). The only reservation we would like to make is that the words used by the appellant in the second last sentence of the said police report which stated as follows:

> Adalah tiada masuk akal Dato' Seri Najib orang yang teraniaya akibat namanya digunakan oleh manusia-manusia durjana didakwa dan tercemar imejnya sedangkan mereka yang memperolehi manfaat dari perlakuan jenayah ini bebas dan tidak didakwa pula.

From the said report, obviously the words "manusia-manusia durjana" and "mereka yang memperolehi manfaat dari perlakuan jenayah ini bebas dan tidak didakwa pula" referred to DAEN since the whole report related only to DAEN's testimony given in the 1MDB trial.

[23] As to the contents of the press statement to the media, the police report exh. A2 was read in full by DSAM at the beginning of the press statement. Then, the appellant commented on what had happened during the SRC International trial (SRC trial) and the 1MDB trial which according to him is a rubbish and the cases will be thrown into the drain. He did comment that the actual wrongdoer in the SRC trial and the 1MDB trial is Low Teck Jho (Jho Low). DAEN, Nik Faisal and Shahrul are the betrayers and conspired with Jho Low to embezzle, misuse power, transfer money into DAEN's overseas account. The appellant also clearly stated that he is waiting for Shahrul to give evidence in court and to file a similar police report as what he did against DAEN after that.

[24] In his submission, learned counsel for the appellant relied on the Federal Court's decision in *Zahida*'s case and the High Court's decision in *Husdi*'s case to substantiate his argument that the police report exh. A2 is an absolute privilege document and no contempt of court proceeding can be initiated against the appellant based on the said police report. For the following reasons, we could not agree with the said argument.

[25] The subject matter in *Zahida*'s case related to a claim on defamation and in *Husdi*'s case is on the issue of the statement made to the police in the course of a police investigation. In *Zahida*'s case, the Federal Court refers to its own decision in *Lee Yoke Yam v. Chin Keat Seng* [2012] 9 CLJ 833; [2013] 1 MLJ 145 which had made clear that absolute privilege was accorded to statements made in a police report on the basis of public policy consideration, irrespective of whether there was an element of malice on the part of the complainant. Thus, no action for defamation would lie against the maker of a police report. In *Husdi*'s case, the High Court is of the view that once a police statement, not a first information report, is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes and there can be no right to inspect. Further, as a matter of public policy, the High Court in *Husdi*'s case is of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses.

[26] In a recent development, the Federal Court took a stand that the principle of absolute privilege will not be extended unnecessarily, in particular on statements made with no genuine intention to discharge the public shared duty in assisting a criminal investigation. In the case of *Nor Aziz Mat Isa v. Sun Teoh Tia (SAC) & Ors* [2021] 3 CLJ 186; [2021] 2 MLJ 142 (*Nor Aziz*'s case) the Federal Court had answered the question in the negative on whether the defence of absolute privilege can be extended to a police report made under s. 107 of the CPC in a disciplinary action. In deciding on the extension, the Federal Court at p. 196 (CLJ) p. 153 (MLJ) made the following observation:

> [23] In our judgment, the suggested extension of the scope of absolute privilege would be wholly disproportionate and unnecessary for the aim of encouraging members of the public to report suspected wrongdoings. The defence of absolute privilege is afforded for sound reasons of policy, but it must not be extended further than is necessary. Thus, in *Darker and others v. Chief Constable of the West Midlands Police* [2001] 1 AC 435, Lord Cooke said at p. 453:
>
> > Absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being McCarthy P's proposition in *Rees v. Sinclair* [1974] 1 NZLR 180 at 187: The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice ...
>
> [24] We respectfully adopt Lord Cooke's speech. Absolute privilege should not be given any wider meaning than is absolutely necessary in the administration of justice. Any extension of absolute privilege must be Viewed with the most jealous suspicion and resisted unless its necessity is demonstrated'. In the Australian case of *Mann v. O'Neill* (1997) 145 ALR 682, Brennan CJ, Dawson, Toohey and Gaudron J had considered the policy considerations for the extension of absolute privilege to such complaints and concluded in their joint judgment that:
>
> > It may be that the various categories of absolute privilege are all properly to be seen as grounded in necessity, and not on broader grounds of public policy. Whether or not that is so, the general rule is that the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated'. Certainly, absolute privilege should not be extended to statements which are said to be analogous to statements in judicial proceedings unless there is demonstrated some necessity of the kind that dictates that judicial proceedings are absolutely privileged.

Thus, it is comprehensible that the intent or purpose of making a police report could determine whether a police report is a privilege document.

[27] Back to the appellant's police report exh. A2, our reservation on the words used in the said police report could determine the intention of the appellant. The words "manusia-manusia durjana" and "mereka yang memperolehi manfaat dari perlakuan jenayah ini bebas dan tidak didakwa pula" should not be there if the appellant sincerely desired to facilitate the effective discharge of the shared public duty in assisting a criminal investigation by the relevant authorities. The appellant is in no position to label DAEN as "manusia-manusia durjana" or make a finding that DAEN had "memperolehi manfaat dari perlakuan jenayah ini bebas dan tidak didakwa pula" as stated in his police report exh. A2. Therefore, we are of the opinion that the principle of absolute privilege should not be extended to statements made by the appellant in his police report exh. A2 following the principal laid down in *Nor Aziz*'s case.

[28] After all, the appellant's actions did not end with the lodging of the police report. On the same evening, he made a press statement to the media commenting on his police report and passing further unnecessary remarks, as can be seen in the transcript exh. A1 against DAEN and other personnel, including the would be witness in the 1MDB trial, Shahrul. We find that the appellant's action falls squarely within the ambit of the Federal Court's decision in *Zahida*'s case that absolute privilege would not attach to the subsequent publication of the contents of the police report to the public at large, save where the contents were made in or in connection with judicial or *quasi*-judicial proceedings. Commenting on the said issue in *Zahida*'s case, the Federal Court's opinion is as follows:

> [49] In our opinion, there is no public policy consideration to recognise that once the police report is absolutely privileged it remains so at whatever occasion it is subsequently published. We agree with the contention of learned counsel for the plaintiff that any public policy and interests of justice do not envisage this. Against such specific contention, we note that learned counsel for the defendant did not respond or address this point. In our opinion, absolute privilege will not attach to the subsequent publication of the contents of the police report to the public at large save where the contents were made in or in connection with judicial or *quasi*-judicial proceedings. At the same time, we would add that whether the defence of qualified privilege protects it, is a matter which we would leave to a case where the question must necessarily be determined.
>
> [50] Furthermore, it has not been demonstrated in the present case of the necessity for the defendant to publish the contents of the police report to the public at large. In this regard, it bears noting, as found by the learned High Court judge, that in her testimony in court, the defendant offered no justification or explanation why it was necessary or reasonable for her to repeat the contents of the police report at the press conference beyond saying that she merely answered the questions posed to her by the reporters. In *Farrell v. St John's Publishing Co Ltd* [1986] NJ No 19, the defendant newspaper published statements referring to a confidential

report of the plaintiff deliberately setting fire in an apartment building. The Court of Appeal of Newfoundland held that 'no privilege attaches to the unwarranted publication of such report'.

[29] In light of the Federal Court's above opinion, it must be emphasised that a balancing act between protecting one's genuine intention to discharge the public shared duty in assisting a criminal investigation by lodging a police report and the need to prevent improper interference with the administration of justice had to be done. Based on the choice of words used by the appellant in his police report exh. A2 and, the act of making a press statement to the media immediately after that, uttering unnecessary remark against DAEN and other individuals including the would be witness in the 1MDB trial, obviously can invite inference to the appellant's *mala fide* intention against DAEN. Therefore, we are of the view that the LHCJ has not erred in his decision even though His Lordship considered both the acts of lodging the police report and making press statements to the media in his deliberation and finding of contempt of court against the appellant.

[30] Next, we have to consider whether the police report lodged against DAEN and the immediate subsequent press statement to the media would amount to a harassment or intimidation. Again, we have to consider the choice of words used in the said police report and the said press statement. Surely the words "manusia-manusia durjana" and "mereka yang memperolehi manfaat dari perlakuan jenayah ini bebas dan tidak didakwa pula" which refer to DAEN is uncalled for. The words used by the appellant in the police report and the words uttered during the press statement is beyond the limits set to discharge the public shared duty in assisting a criminal investigation. Appellant's public duty in assisting a criminal investigation does not extend to a passing of a moral judgment against DAEN, however justified. More so, the relevant authorities had yet to investigate the complaint made. Thus, the appellant should refrain himself from making his own finding against DAEN. Having uttered those words in his police report and repeating them in the press statement released soon after that, shows the real intention of the appellant to harass or to intimidate DAEN who had given his testimony in the ongoing 1MDB trial.

[31] The appellant in such a case or anybody else in that situation must always remember that the courts have been given the duty to try cases. The courts have the right to make sure that the cases before them are tried by them only and not by anyone else. Intimidating DAEN using the testimony that he had given in the 1MDB trial and that trial is still ongoing surely attracted adverse view as to the credibility of DAEN, not only to the court, but to the mind of public at large which will likely to prejudice the fair trial of the ongoing trial. Even worse, it is likely to prejudice the confidence of the public in the role of the courts in the administration of justice. Therefore, all courts have the duty to protect those who give evidence before them or

who are brought into court to participate in the administration of justice. In discharging the duty, all courts must be ready to use all powers that are available to them, whether it is in the form of codified law or discretionary powers under inherent jurisdiction, including the contempt of court proceeding.

[32] On the issue of harassment and/or intimidation of witnesses, it is trite that both actions, whether it is done before or after they give evidence, amounts to an interference with the administration of justice and constitute a contempt of court. The authorities sited by LHCJ in his decision are on point. In *R v. Smithers and Bowen* (1983) 5 Cr App R (S) 248, Bingham J said:

> Generally, it is essential that those who give evidence in a court of law should be protected from insults and abuse. It is not an agreeable task to give evidence at the best of times, but it is very much more disagreeable if conduct of this kind is allowed to flourish. The administration of justice depends on witnesses coming forward, and they must be confident in doing so that the law will protect them.

In *Attorney General v. Butterworth And Others* [1962] 3 All ER 326 (*Butterworth*'s case), Lord Denning M.R. at p. 329 made the following observation:

> I cannot agree with the decision of the *Restrictive Practices Court*. It may be that there is no authority to be found in the books, but, if this be so, all I can say is that the sooner we make one the better. For there can be no greater contempt than to intimidate a witness before he gives his evidence or to victimise him afterwards for having given it. How can we expect a witness to give his evidence freely and frankly, as he ought to do, if he is liable, as soon as the case is over, to be punished for it by those who dislike the evidence he has given? After he has honestly given his evidence, is he to be liable to be dismissed from his employment, or to be expelled from his trade union, or to be deprived of his office, or to be sent to Coventry, simply because of that evidence which he has given? I decline to believe that the law of England permits him to be so treated. If this sort of thing could be done in a single case with impunity, the news of it would soon get round. Witnesses in other cases would be unwilling to come forward to give evidence, or, if they did come forward, they would hesitate to speak the truth, for fear of the consequences. To those who say that there is no authority on the point, I would say that the authority of Lord Langdale MR in *Littler v. Thomsone* in 1839 is good enough for me:
>
> > ... if witnesses are in this way deterred from coming forward in aid of legal proceedings, it will be impossible that justice can be administered. It would be better that the doors of the courts of justice were at once closed.
>
> I have no hesitation in declaring that the victimisation of a witness is a contempt of court, whether done whilst the proceedings are still pending or after they have finished. Such a contempt can be punished by the court

itself before which he has given evidence; and, so that those who think of doing such things may know where they stand, I would add that, if the witness has been damnified by it, he may well have redress in a civil court for damages.

Donovan LJ shared the same sentiment. At p. 332, His Lordship made the following observation:

> The question to be decided here, as in all cases of alleged contempt of court, is whether the action complained of is calculated to interfere with the proper administration of justice. There is more than one way of so interfering. The authority of a court may be lowered by scurrilous abuse. Its effectiveness to do justice may be diminished or destroyed in a pending case by frightening intending witnesses from the witness box. After giving evidence, a witness may be punished for having done so, thereby deterring potential witnesses in future cases from risking a like vengeance. I see no such difference between any of these three methods as makes the first two contempt of court, and the third not. Each is calculated to do the same thing, namely, to interfere with the proper administration of the law in courts of justice. ...

Pearson LJ agree with the two judgments which have been delivered. At p. 334, His Lordship held that:

> ... In my judgment, however, such victimisation, because it tends to deter persons from giving evidence as witnesses in future proceedings and giving their evidence frankly and fully and without fear of consequences, is an interference with the due administration of justice as a continuing process, and does constitute contempt of court, and can be dealt with summarily under the inherent jurisdiction. ...

In *Giani Ram v. Ramnath Dutt* AIR 1955 Rajashtan 123, Modi J made the following finding:

> We wish to point out in this connection that a number of agencies or persons have their own contributions to make in carrying a judicial proceeding to its proper conclusion the object where; of undoubtedly is to ascertain the true facts and to do justice and that the law of contempt throws a ring of protection around the entire course of litigation, Witnesses no less than Judges and counsel axe, an integral part of this process and they must be left unhampered to perform their respective duties with frankness and without interference of any kind. We have, therefore, no doubt whatever that anything which tends to impair the legitimate: freedom of any of these cannot but result in obstructing the course of justice and such interference must be reprobated.

[33] The above authorities would also be applicable to another area of an interference with the administration of justice. In his press statement to media immediately after lodging the police report exh. A2, the applicant uttered *inter alia* the following words:

... Jadi kita tuntut supaya kes Dato Sri Najib ni hentikan perbicaraan ehhh hakim pun dah boleh menilai bahawa kes ini ehhh kes sampah!! ehh kes sampah!! dan kita lihat perbicaraan telah membuktikan bahawa Dato Sri Najib dianiaya si pelaku sebenar ialah Jho Low si pelaku sebenar yang salah seleweng dan salah guna kuasa ialah Nik Faisal dan juga Amhari *... begitu juga dengan Shahrul ehh. Selama hari ni kita tak pernah balun Shahrul ni tapi hari ni saya nak beritahu antara sebab kenapa 1MDB banyak membuat keputusan keputusan bodoh ehhh* contohnya di Pulau Pinang mereka membeli 10,000 ahh membeli tanah untuk membina 10,000 unit rumah mampu milik ... tujuan tuh memang cantik untuk erghh rumah mampu milik tetapi kena ingat dia beli tanah dengan harga yang besar dan "model" ape niii perniagaan modal perniagaan 1MDB kita Cuma bagi modal 1 juta macam mana nak bina 10,000 unit rumah mampu milik sudah pasti dia kena dapatkan modal daripada pasaran modal sudah pasti dia kena terbitkan 5 billion bon yang menyebabkan Sultan Terengganu tidak bersetuju menyebabkan kerajaan Terengganu tak setuju dan akhirnya Terengganu Investment Authority terpaksa kita tukar menjadi ... menjadi 1MDB dan bila 1MDB modalnya datang daripada pinjaman modalnya datang dari penerbitan bon uhukkk uhukkk ... (Batuk) bagaimana mungkin manusia yang menjadi CEO seperti Shahrul ini boleh beli tanah yang dia tahu kalau nak bina 10,000 unit rumah mampu milik itu pun mestilah mendapat kebenaran daripada kerajaan negeri Pulau Pinang! bagaimana mungkin kerajaan negeri Pulau Pinang yang kita tahu diperintah oleh DAP ketika itu, mahu meluluskan aaa pembinaan 10,000 unit rumah mampu milik, kalau ada 10,000 satu rumah ada 3 orang pengundi dah ada 30,000 pengundi ... kalau 30,000 pengundi ni ehh dapat rumah mampu milik diberikan oleh kerajaan Barisan Nasional tak kan mereka tak appreciate kita ... ehh ... tak kan mereka akan mengundi DAP dalam pilihan raya itu kawasan pilihanraya Jelutong itu, itu kawasan Karpal Singh dulu ... Jadi! kenapa dah tahu tak boleh lulus pembinaan bangunan itu ataupun rumah mampu milik itu ... Shahrul boleh beli tanah ini ... Jadi ini juga perlu disiasat oleh pihak polis ...! *Saya tengah tunggu, saya tengah rakam apa yang Shahrul katakan dalam mahkamah ... ehhh! Saya akan kumpulkan dan kita akan buat laporan keatas Shahrul juga selepas ni ... yaaa yaaa (suara orang awam). Kita tak kan bagi peluang pengkhianat-pengkhianat yang takut dipenjarakan oleh SPRM ... menjadi BARUA kepada SPRM!!!! ehhh! ... jangan reka cerita yang bukan-bukan* ... untuk menjatuhkan imej dan kredabiliti Dato Sri Najib Tun Razak ... (emphasis added)

[34] From the statement made, the one named Shahrul has yet to give evidence in the ongoing 1MDB trial. Threatening a would be witness in the court of law should not be taken lightly. The appellant's actions in threatening and intimidating the would-be witness cannot be tolerated. The act is crystal clear as interference or obstructing the administration of justice.

[35] In his written submission, learned counsel for the appellant invites us to take judicial notice that the other witnesses in the 1MDB trial could not possibly be affected by this purported intimidation. Datuk Shahrol Azral, who is referred to as 'Shahrul' in the transcript exh. A1, went on to give

evidence without any fear or any indication that he was intimidated by the appellant's statement. In fact, the IMDB trial has gone and so many prosecution witnesses have given evidence where none of them shows any indication that they were affected and/or intimidated by the actions taken by the appellant.

[36] With due respect, we cannot agree with the submission. We are in agreement with the LHCJ's finding that whether the witness is actually deterred or influenced by the appellant's statement is of no consequence. It is sufficient if the action complained of is inherently likely to interfere with the administration of justice. His Lordship refer to the decision in *R v. Kellett* [1975] 3 All ER 468, cited by the respondent. We as well like to refer to Lord Diplock decision in *Attorney General v. Leveller Magazine Ltd and others* [1979] 1 All ER 745 at p. 947 as follows:

> My Lords, although criminal contempts of court make take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.
>
> Of those contempts that can be committed outside the courtroom the most familiar consist of publishing, in connection with legal proceeding that are pending or imminent, comment or information that has a tendency to pervert the course of justice, either in those proceedings or by deterring other people from having recourse to courts of justice in the future for the vindication of their lawful rights or for the enforcement of the criminal law. In determining whether what is published has such a tendency a distinction must be drawn between reporting what actually occurred at the hearing of the proceedings and publishing other kinds of comment or information, for *prima facie* the interests of justice are served by its being administered in the full light of publicity.

So, the appellant's act of threatening a would be witness through his press statement is an act of flouting the administration of justice itself and not the court or the witness. Once it is established that the act flouted the administration of justice, it is a contempt of court regardless of whether the witness was affected by the statement or not.

[37] Now, we move to another issue raised by learned counsel for the appellant, that is the respondent failed to particularise the specific words of the intimidation in the statement filed under O. 52 r. 3(2) of the ROC. Thus, it is argued that the appellant was prejudiced by the uncertainties of the charge that he had to purge. On this particular issue, the LHCJ held that both the transcript of the press statement and the police report were referred to in the statement as exhs. A1 and A2 respectively. If there was any doubt at all as to what the offending portions were, even a cursory examination of those exhibits would have resolved it.

[38] On this issue, we would like to refer to the amended statement filed pursuant to O. 52 r. 3(2) of the ROC dated 21 November 2019 marked as exh. "A4" in the supporting affidavit by AHBI that can be seen at pp. 134 to 143 of encl. 9. In the statement, at para. 3(a) the respondent had listed down several acts of contempt of court allegedly committed during the press statement to the media and at para. 3(b), the respondent clearly stated that the object or purpose of the appellant lodging the police report was to harass and intimidate DAEN, other witnesses and any potential witnesses who may come forward to give evidence in the 1MDB trial. To support the statement, the respondent also exhibited a copy of the press statement transcript marked as A1 and a copy of the police report marked as A2. We are of the view that the said amended statement together with the exhibits tendered formed a sufficient notice to the appellant to purge the charge of contempt of court.

[39] Finally, we would address the issue of burden of proof in the contempt of court proceeding particularly on the element of *mens rea*. Learned counsel for the appellant argued that the respondent had failed to prove beyond reasonable doubt that the actions taken by the appellant were with the intention of harassing or intimidating DAEN or the would be witnesses.

[40] Generally, the burden is always on the prosecution to prove beyond reasonable doubt not only the *actus reus* of an accused person, that is the accused had committed the wrongful act, but also his *mens rea*, that is his guilty mind. However, there are exceptions in which a person may be guilty of an offence although he had no guilty mind. Contempt of court is one of those. Lord Denning M.R. in *Butterworth*'s case at p. 331 had observed that:

> ... Much of the argument to the contrary was based on *R v. Odhams Press Ltd Ex p A-G*, which established, it was said, that the test of criminal contempt was objective and not subjective. I do not like those obscurantist expressions "objective" and "subjective". As the argument developed, it seemed to go something like this: In considering whether a man has been guilty of contempt of court, one does not look at his knowledge or intention, but only at what he did. If his action was calculated to interfere with the course of justice that is enough, irrespective of his state of mind at the time. ...

Butterworth's case has been referred to by the Malaysian courts and in Malaysia it has been established that the state of the accused mind, that is, whether it must be proved that the accused has intended to interfere with the course of justice, is irrelevant and all that is required to be proved is that the accused committed the requisite act. See *Attorney-General v. Manjeet Singh Dhillon* [1991] 1 CLJ 216; [1991] 1 CLJ (Rep) 22; [1991] 1 MLJ 167, *Murray Hiebert v. Chandra Sri Ram* [1999] 4 CLJ 65; [1999] 4 MLJ 321, *Re Zainur Zakaria* [1999] 3 CLJ 696; [1999] 2 MLJ 577, *Koperasi Serbaguna Taiping Barat Bhd v. Lim Joo Thong* [1998] 1 LNS 366; [1999] 6 MLJ 38, *Monatech*

(M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401; [2002] 4 MLJ 241 and *Achieva Technology Sdn Bhd v. Lam Yen Ling & Ors* [2009] 1 LNS 432; [2009] 8 MLJ 625.

[41] In *PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener)* [2019] 6 CLJ 1; [2019] 4 MLJ 747 (*PCP Construction*'s case), *mens rea* test for the offence of scandalising contempt in Malaysia is summarised at Held (3) of the headnote as follows:

> The *mens rea* test under Malaysian common law to determine liability for the offence of scandalising contempt was the objective test, *ie*, whether the publication was intentional and not whether there was intention to interfere with the administration of justice. In conducting the objective inquiry, the court had to assess whether the impugned statements would undermine public confidence in the administration of justice based on its effect on the ordinary reasonable reader of average intelligence. The impugned statements in the instant case would have given such a reader the impression that there was corruption in the conduct of the *PCP-Leap Modulation* case; that the Federal Court's expunction of portions of the dissenting judgment was improper, in breach of substantive and procedural law and corrupt. Taken in its entirety, Arun Kasi's statements were clearly directed at the Federal Court and the Judiciary as a whole (see paras. 55, 58, 63 & 83-88).

At p. 24 (CLJ); p. 770 (MLJ), the Federal Court held that:

> [61] The only requirement is that the publication of the impugned articles is intentional. It is not necessary to prove an intention to undermine public confidence in the administration of justice or the Judiciary. It does not matter whether the author or the publishers intended the result. It follows therefore, that it is no defence for the author of such impugned statements to claim that he did not know that the statements would have the effect of undermining public confidence or that he did not intend to erode public confidence in the administration of justice.

After considering the authorities cited by the parties in relation to the test for *mens rea* in a scandalising contempt, that is the case of *Dhooharika v. Director Of Public Prosecutions (Commonwealth Lawyers' Association Intervening)* [2015] AC 875, a Privy Council case from the Supreme Court of Mauritius (*Dhooharika*'s case) cited by learned counsel for the contemnor and the Singapore case of *Au Wai Pang v. Attorney-General* [2016] 1 SLR 992 cited by the Attorney General where the Singapore Court of Appeal declined to follow *Dhooharika*'s case, the Federal Court had made the following conclusion:

> [70] Such a stringent *mens rea* test is not suitable in the local context. There is no reason for us to depart from the position under Malaysian common law. We do not require a more stringent test because the offence is not obsolete in this country as may be the case elsewhere. It must be clarified that we are in no way discouraging cogent and rational

> complaints of corruption which should be directed to the relevant authorities. What is not encouraged are general scurrilous allegations, devoid of any cogent or rational particulars which are made irresponsibly, and which have the effect of tainting the Judiciary as an institution generally. That has the effect of eroding public confidence in the administration of justice and comprises the core element for scandalising contempt.

[42] Back to the appeal before us, from the facts which are not disputed, there is no doubt that the appellant had intentionally lodged the police report exh. A2 including the choice of words used in the said report. Similarly, the act of explaining his police report and further uttering intimidating comments against DAEN and future witnesses in the ongoing 1MDB trial *via* press statement, which was held soon after lodging the police report, was also done intentionally. Therefore, following the Federal Court's decision in *PCP Construction*'s case, we find that there is nothing wrong when the LHCJ makes a finding that "In so doing his *mens rea* was made manifest" in his judgment.

Sentence

[43] Both the appellant and the respondent appealed against the LHCJ decision on sentence.

[44] Based on the LHCJ grounds of judgment, His Lordship considered all submissions presented by both parties. The LHCJ takes into consideration that DAEN was threatened with giving evidence against the accused in the 1MDB trial and the effect of the press statements made by the appellant also gave rise to a real risk of impeding or deterring future witnesses from giving evidence in a like manner. The LHCJ is of the opinion that interference with the administration of justice cannot be taken lightly and the courts must sanction such action with the punishment it deserves to reflect its abhorrence of such conduct and to act as a deterrent to would be offenders. The LHCJ also observed that the appellant displayed no remorse and was unrepentant, which in His Lordship view, had to be considered as an aggravating factor.

[45] When a sentence is appealed, it is an established principle that an appellate court would be slow in disturbing the sentence imposed by the trial court as the power of sentencing is a discretionary one, unless it can be shown that there is something wrong with the sentence, such as it is excessive or it was passed due to a failure to apply the right principles. Raja Azlan Shah Ag LP (as his Majesty then was) in *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83 when delivering the judgment of the Federal Court, said:

> As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion

A to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different
B conclusions (see *Jamieson v. Jamieson*). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore, sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has
C said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.

In *Ang Chai Seng v. PP* [2000] 1 CLJ 213; [2000] 2 MLJ 35, this court had
D made the following observation:

The power of sentencing is a discretionary one and it has been a firmly established principle that an appellate court would be slow to disturb the sentence imposed by the lower courts unless the sentence is excessive to such an extent as to satisfy this court that when it was passed there was
E a failure to apply the right principles then this court will intervene (*R v. Kenneth John Ball* 35 Cr App R 164). According to Hashim Yeop Sani J (as he then was) in *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 257G: 'It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence'.

F **[46]** For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion in his judgment. As a matter of fact, learned counsel for the appellant did not address at all the issue of sentencing in his written submission. Before us, no
G cogent reason given in the oral submission by learned counsel for the appellant to enable us to disturb the LHCJ sentence imposed against the appellant. On the other side, the learned Deputy Public Prosecutor (the learned DPP) on behalf of the respondent submitted that the case under appeal is a public interest case since the offence of interference with the administration of justice is serious in nature and the sentence imposed by the
H LHCJ is insufficient to punish and deter the appellant or others from similar conduct. The learned DPP also referred us to the trend of past sentencing in contempt of court offences.

[47] We had carefully considered the arguments tendered by both sides. We are of the opinion that the LHCJ in fixing the punishment for the offence
I of contempt of court committed by the appellant had taken into consideration

the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the appellant in committing the offence and the other aggravating factors involved. We also find that the sentence is within the ambit of the LHCJ's discretion and passed in accordance with established judicial principles. Therefore, we find no good reason to disturb the sentence passed by the LHCJ.

Conclusion

[48] Based on the foregoing reasons, we unanimously find and held that there are no merits in both appeals to warrant our intervention. Both appeals, Appeal No. W-05-241-07-2021 by the appellant against the conviction and sentence and Appeal No. W-05(H)-246-07-2021 by Attorney General against sentence are hereby dismissed. We affirm the LHCJ decision.